

JAN 16 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6057

DATE COMPLAINT FILED: August 20, 2008

DATE OF NOTIFICATION:

LAST RESPONSE RECEIVED:

DATE ACTIVATED: October 21, 2008

EXPIRATION OF SOL:

March 13, 2013 (earliest)/May 22, 2013 (latest)

COMPLAINANT:

Grant Bosse

RESPONDENTS:

**Jennifer Horn for Congress and
Mark S. Cooksen, in his official capacity as
treasurer**

**RELEVANT STATUTE AND
REGULATION:**

**2 U.S.C. § 432(c)
11 C.F.R. § 102.9(e)**

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter arises out of a complaint alleging that Jennifer Horn for Congress and Mark S. Cooksen, in his official capacity as treasurer ("the Committee"), used general election funds to pay for campaign expenses before the primary election. However, a review of the Committee's disclosure reports filed with the Federal Election Commission ("the Commission") reveals that the Committee's cash on hand during the relevant reporting periods exceeded the total general election contributions minus general election disbursements during those time periods. Therefore, we recommend that the Commission find no reason to believe that the

1 Committee violated the Federal Election Campaign Act of 1971, as amended ("the Act") or
2 Commission regulations in connection with the allegations in this matter.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. BACKGROUND**

5 Complainant, Grant Bosse, alleges that his opponent's campaign used general election
6 funds to pay for campaign expenses before the primary election. Bosse and Horn were both
7 candidates for the Republican nomination in New Hampshire's Second Congressional District
8 during the 2008 election cycle. Horn ultimately won the primary election held on September 8,
9 2008, and went on to run in the general election against the Democratic nominee. She then lost
10 the general election on November 4, 2008.

11 The complainant explains that he reviewed the Committee's 2008 April and July
12 Quarterly Reports filed with the Commission and found that the Committee carried a negative
13 primary balance at various points during the primary election period, including from March 18
14 through March 31, on May 5, and from May 20 through May 22. See Complaint and
15 Attachments. Bosse alleges that the campaign's expenditures "regularly exceeded the amount of
16 cash-on-hand available to [the Committee] during the primary" and that the Committee must
17 have used "Max Out" contributions exceeding \$2,300 during the primary election period to cause
18 the Committee to carry a negative primary balance. *Id.* The Complaint states that even
19 assuming that the Committee received all of its unitemized receipts at the beginning of each
20 reporting period, the campaign still spent funds in excess of its primary election funds.

21 The Committee contends that it complied with Commission regulations by having
22 recorded cash on hand in excess of general election funds during both the April and July
23 Quarterly reporting periods in question. See Committee's Response to Complaint at 2. The

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1 Committee's response also clarifies that certain general election expenses for phones and rent
2 totaling \$3,905 were incurred during the primary, which explains its alleged use of general
3 election funds during the primary election period. It notes that these expenses were for deposits
4 that will be refunded at the end of the campaign and will be available should the candidate lose
5 the primary election. *Id.* at 1.

6 The Committee filed three disclosure reports with the Commission before the primary
7 election of September 9, 2008. In its 2008 April Quarterly Report, the Committee disclosed cash
8 on hand in the amount of \$30,671.90; \$11,750 in total contributions designated toward the
9 general election; and no disbursements for general election purposes. In its 2008 July Quarterly
10 Report, the Committee reported cash on hand in the amount of \$20,745.34; no contributions
11 designated toward the general election; and no disbursements for general election purposes.
12 Finally, in its 2008 Pre-Primary Report, the Committee reported cash on hand in the amount of
13 \$145,491.84; no contributions designated toward the general election; and no disbursements for
14 general election purposes.

15 B. ANALYSIS

16 The Act requires treasurers to keep an account of all contributions received by a political
17 committee. 2 U.S.C. § 432(c). Committees can accept contributions for the general election
18 before the primary election provided that they employ "an acceptable accounting method to
19 distinguish between contributions received for the primary election and contributions received
20 for the general election." 11 C.F.R. § 102.9(e)(1); Advisory Opinion 1980-122 (New Yorkers for
21 Myerson), at 1-2. Acceptable accounting methods for this purpose include the designation of
22 separate accounts for each election or the establishment of separate books and records for each
23 election. 11 C.F.R. § 102.9(e)(1). A committee's records must demonstrate that "prior to the

1 primary election, recorded cash on hand was at all times equal to or in excess of the sum of
2 general election contributions received less the sum of general election disbursements made.”
3 11 C.F.R. § 102.9(e)(2). In the context of an advisory opinion, the Commission described the
4 purpose of these regulations, stating that “[t]hese regulations are designed to ensure that
5 candidates in [this] situation do not use general election contributions for the primary election.”
6 Advisory Opinion 1992-15 (Russo for Congress), at 2.

7 Further, general election contributions may be used to make advance payments for
8 general election purposes, but should the candidate not win the primary election, the committee
9 must have enough cash on hand to refund all general election contributions. *See* MUR 5388 (Jim
10 Treffinger for Senate), Factual and Legal Analysis, at 2; *see also* Advisory Opinion 1986-17
11 (Friends of Mark Green), at 4 (concluding that the Act did not prohibit a committee from making
12 expenditures for the general election before the primary election, such as advance payments or
13 deposits in connection with the general election). If a candidate is not a candidate in the general
14 election, any contributions made for the general election must be refunded to the contributors,
15 redesignated, or reattributed. *See* 11 C.F.R. § 102.9(e)(3); *see also* Advisory Opinion 1986-17
16 (Friends of Mark Green), at 3 (stating that contributions designated for a particular election may
17 be accepted but become refundable to the contributors if the candidate does not participate in that
18 election). As discussed above, Horn was a candidate in both the primary and general elections.
19 Thus, the Committee was permitted to accept both contributions toward the primary and general
20 election and make disbursements for primary and general election purposes.

21 Our review of the Committee's receipts and disbursements disclosed in its 2008 April
22 Quarterly, July Quarterly, and Pre-Primary Reports indicates that the Committee's recorded cash
23 on hand during each of those periods exceeded its general election contributions minus general

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1 election disbursements. On their face, the Committee's disclosure reports do not reveal
2 violations of the Act in connection with the allegations in this matter. The complainant,
3 however, draws attention to the Committee's unitemized receipts as possibly having an effect on
4 the cash on hand balance, but that concern has no bearing on our analysis of the Committee's
5 balances. Because there is no way to determine the specific dates when the Committee received
6 unitemized receipts, other than through a review of the Committee's internal records, we
7 examined the Committee's cash on hand balances under two scenarios: (1) including the
8 unitemized receipts at the beginning of each reporting period, and (2) including the unitemized
9 receipts at the end of each reporting period. During the April Quarterly reporting period, adding
10 the unitemized receipts at the end of the period results in the Committee carrying a negative
11 balance for nine days in March 2008, from March 18 through March 27, 2008, in amounts
12 ranging from \$74 to \$2,474. However, adding the unitemized receipts at the beginning of the
13 reporting period results in no negative balance throughout the period. During the July Quarterly
14 reporting period, the Committee carried a positive balance regardless of when the unitemized
15 receipts are included. Finally, during the Pre-Primary reporting period, the Committee carried a
16 negative balance during the first eight days of the period in amounts ranging from \$500 to \$3,591
17 when the unitemized receipts were added at the end of the reporting period, but that negative
18 balance is eliminated if the unitemized receipts are added at the beginning of the period.

19 Regardless of how we examine the Committee's receipts and disbursements, the end
20 result is the same: the Committee's recorded cash on hand balances exceeded its general election
21 contributions minus general election disbursements for each reporting period. While the
22 complainant argues that the use of any general election funds is strictly prohibited, Commission
23 regulations only prohibit Committees from making disbursements that exceed their cash on hand

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1 balance for the primary election. *See* 11 C.F.R. § 102.9(e)(2); *see also Explanation and*
2 *Justification for Contribution Limitations and Prohibitions*, 67 Fed. Reg. 69,928, 69,929
3 (Nov. 19, 2002) (establishing that the standard for an acceptable accounting method is that "a
4 committee's records must demonstrate that prior to the primary election, recorded cash on hand
5 was at all times equal to or in excess of the sum of general election contributions received less
6 the sum of general election disbursements made"). Further, the Act and Commission regulations
7 only require the itemization of receipts that have an aggregate amount or value in excess of \$200.
8 2 U.S.C. § 434(b)(3); 11 C.F.R. § 104.3(4)(i). Our examination of the Committee's disclosure
9 reports pursuant to those requirements did not reveal violations of the Act or Commission
10 regulations.

11 Accordingly, the information available in the Committee's disclosure reports
12 demonstrates that the Committee had sufficient funds for its primary election expenses, and the
13 Complaint fails to provide any specific information to contradict those reports. Therefore, we
14 recommend that the Commission find no reason to believe the Committee violated 11 C.F.R.
15 § 102.9(e) in connection with the allegations in this matter.

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III. RECOMMENDATIONS

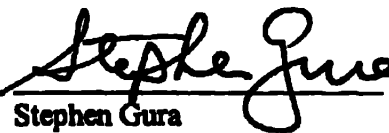
1. Find no reason to believe that Jennifer Horn for Congress and Mark S. Cooksen, in his official capacity as treasurer, violated 11 C.F.R. § 102.9(e);
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.

Thomasenia P. Duncan
General Counsel

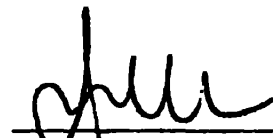
1/16/09

Date

BY:



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